



Dupont, P-L. (2016). Human Rights and Substantive Equality in the Adjudication of Ethnic Practices. *Nordic Journal of Human Rights*, 34(4), 289-313. <https://doi.org/10.1080/18918131.2016.1243881>

Publisher's PDF, also known as Version of record

Link to published version (if available):  
[10.1080/18918131.2016.1243881](https://doi.org/10.1080/18918131.2016.1243881)

[Link to publication record in Explore Bristol Research](#)  
PDF-document

## University of Bristol - Explore Bristol Research

### General rights

This document is made available in accordance with publisher policies. Please cite only the published version using the reference above. Full terms of use are available:  
<http://www.bristol.ac.uk/red/research-policy/pure/user-guides/ebr-terms/>



## Human Rights and Substantive Equality in the Adjudication of Ethnic Practices

Pier-Luc Dupont

**To cite this article:** Pier-Luc Dupont (2016) Human Rights and Substantive Equality in the Adjudication of Ethnic Practices, Nordic Journal of Human Rights, 34:4, 289-313, DOI: [10.1080/18918131.2016.1243881](https://doi.org/10.1080/18918131.2016.1243881)

**To link to this article:** <http://dx.doi.org/10.1080/18918131.2016.1243881>



Published online: 22 Nov 2016.



Submit your article to this journal [↗](#)



View related articles [↗](#)



View Crossmark data [↗](#)

# Human Rights and Substantive Equality in the Adjudication of Ethnic Practices

Pier-Luc Dupont

PhD researcher, Human Rights Institute, University of Valencia

## ABSTRACT

With the development of human rights and anti-discrimination law, courts have increasingly been called upon to protect ethnicity-related practices from general criminal and civil sanctions. These 'claims of culture' have so far been addressed with remarkable inconsistency, leading to popular fears of unlimited normative pluralism and targeted legislative measures. Compounding such controversies, philosophical approaches to multiculturalism have mostly been concerned with policy and offered vague or distorted portrayals of judicial challenges. This article seeks to fill the gap by exploring how the legal standard of substantive equality might structure the courts' approach to a range of cases involving minority litigants. In particular, I will argue that ethnic practices can be usefully divided into four categories triggering distinct modes of legal reasoning: criminal offences, human rights violations, civil infractions, and symbolic identification. In the first case, cultural differences mainly bear on the analysis of subjective blameworthiness, whereas in the second, they bring out an ongoing shift in the public/private and negative/positive nature of human rights obligations. Civil infractions call for the application of anti-discrimination standards developed in the doctrine of indirect discrimination and reasonable accommodation. As for symbolic identification, it raises the issue of national identities and legal instruments to make them inclusive of the whole citizenry.


## KEYWORDS

Multiculturalism; Anti-discrimination; Human Rights; Ethnicity; Legal Philosophy

## I. Introduction

In April 2013, the Belgian Council of State nullified a primary school regulation prohibiting the display of religious symbols by all teachers, except those of religious or moral subjects within the classroom. Two months later, the same court unexpectedly refused to suspend an administrative circular issued by the Board of Flemish Community Schools, similarly banning conspicuous 'philosophical' signs (except during relevant classes).<sup>1</sup>

Almost simultaneously, a Dutch Cantonal Court cancelled a fine imposed on an orthodox Jew for not carrying his identity document on the Sabbath, accepting that Jewish

**CONTACT** Pier-Luc Dupont  [pier.dupont@uv.es](mailto:pier.dupont@uv.es)

<sup>1</sup>European Network of Legal Experts in the Non-Discrimination Field, 'News from the EU Member States, the FYR of Macedonia, Iceland, Liechtenstein, Norway and Turkey' (2014) 18 *Eur Anti-Discrimination L Rev* 47, 49–50. On 14 October 2014, the Court decided it had no competence to cancel the circular but annulled its transposition in specific schools. See European Network of Legal Experts in Gender Equality and Non-Discrimination, 'Key Developments at National Level in Legislation, Case Law and Policy' (2015) 1 *Eur Equality L Rev* 74, 79.

norms prohibit the transportation of any private object into the public domain on this day. In the midst of a political controversy, the public prosecutor lodged an appeal at the District Court, which found that identification requirements allowed no religious exemptions and consequently restored the fine.<sup>2</sup>

In 2009, the Superior Court of New Jersey exonerated a Moroccan Muslim from criminal liability for raping his wife, arguing that he did not

have a criminal desire to or intent to sexually assault or sexually contact the plaintiff when he did [...]. He was operating under his belief that it is, as the husband, his desire to have sex when and whether he wanted to, was something that was consistent with his practices and it was something that was not prohibited [sic].<sup>3</sup>

The decision was overturned two years later on the grounds that the defendant was aware of the victim's lack of consent 'regardless of his view that his religion permitted him to act as he did'.<sup>4</sup>

As these recent cases show, two decades of rigorous academic debate on what has been called the "claims of culture",<sup>5</sup> usually framed in the language of religious freedom and non-discrimination, have not impeded the proliferation of contradictory, apparently unprincipled judicial approaches. Such unpredictability has not only left courts open to charges of bias against minorities, especially Muslims,<sup>6</sup> but also catalysed regressive legislative reforms seeking to restrict judicial discretion or increase penalties for ethnicity related offences. For example, several European countries have specifically defined female genital mutilation as a criminal offence;<sup>7</sup> culturally connoted laws have also been introduced against polygamy, forced marriages, honour killings and the imposition of the full veil.<sup>8</sup> In the United States, around two-dozen states have proposed bills that would prevent judges from taking foreign or international law into consideration, especially Sharia.<sup>9</sup> In Quebec, religious exemptions from administrative regulations triggered a protracted polemic that culminated in the appointment of a high-profile consultative commission.<sup>10</sup> The commission's extensive report did not settle the issue, however, and nationalists subsequently campaigned on a law that sought to prevent civil servants from manifesting their faith at work and restrict the adaptation of public services to religious demands.<sup>11</sup> The initiative was tabled after the formation of a liberal government.

<sup>2</sup>European Network of Legal Experts in the Non-Discrimination Field, 'News from the EU Member States, the FYR of Macedonia, Iceland, Liechtenstein, Norway and Turkey' (2013) 17 *Eur Anti-Discrimination L Rev* 49, 75.

<sup>3</sup>*SD v MJR*, 2 A 3d 412 (NJ Super Ct App Div 2010).

<sup>4</sup>*ibid.*

<sup>5</sup>S Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era* (Princeton University Press, Princeton 2002).

<sup>6</sup>P Danchin, 'Islam in the Secular *Nomos* of the European Court of Human Rights' (2011) 32 *Michigan J of Intl Law* 663; A Cebada Romero, 'The European Court of Human Rights and Religion: Between Christian Neutrality and the Fear of Islam' (2013) 11(1) *The New Zealand J of Public and Intl Law* 75.

<sup>7</sup>A Solanes Corella, 'Human Rights and Conflicts in European Multicultural Societies' (2013) 7(1) *Migraciones Internacionales* 72.

<sup>8</sup>See inter alia the Canadian Zero Tolerance for Barbaric Cultural Practices Act (18 June 2015) and the French Loi n° 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public (Art 4).

<sup>9</sup>E Kim, 'Islamic Law in American Courts: Good, Bad, and Unsustainable Uses' (2014) 28(1) *Notre Dame J of Law, Ethics & Public Policy* 287.

<sup>10</sup>P Bosset, 'La "crise" des accommodements raisonnables: Regards d'un juriste sur le rapport Bouchard-Taylor' (2009) 3(2) *Revue de droit parlementaire et politique* 323.

<sup>11</sup>Charte affirmant les valeurs de laïcité et de neutralité religieuse de l'État ainsi que d'égalité entre les femmes et les hommes et encadrant les demandes d'accommodements, draft bill no 60 introduced by Bernard Drainville, Minister of Democratic Institutions and Citizen Participation.

These worrying developments show the need for a morally defensible, legally plausible and politically appealing approach to determine the extent to which courts should protect practices that are rooted in minority cultural norms or traditions (henceforth labelled 'ethnic'). By combining various disciplinary insights into multiculturalism, this article seeks to illuminate the moral issues at stake in judicial responses to ethno-cultural claims. This is done through the prism of substantive equality, understood as a legal principle that sometimes allows or mandates status-based differential treatment aimed at the emancipation of discriminated social categories. Since the discussion is intended as an exercise in applied legal philosophy, it will not delve into the specificities deriving from domestic legal traditions, statutes, institutions and political environments. I will, however, rely on the fast-growing body of comparative research on the ways in which courts resolve conflicts between ethnic practices and general regulations. These analyses have shown that judicial approaches cannot be reduced to all-or-nothing decisions (whether to protect or forbid the practice) and may lead to a wide array of sanctions. They have also provided valuable insights into recurring problems and cross-national trends. In particular, legal developments propitiated by the European Union and the Council of Europe are given special attention, both for the breadth of their scope and their capacity to reflect a degree of consensus among a variety of consolidated democracies. This being said, it is indisputable that some courts may be more reluctant than others to accept, implicitly or explicitly, the moral and sociological arguments that underpin the following recommendations. Even then, and provided these arguments can withstand critical scrutiny, they could still prove useful as a guide for future legislative reforms.

As many other theorists of multiculturalism, I start from Kymlicka's canonical attempt to reconcile liberalism with the deliberately non-neutral Canadian strategy of cultural governance.<sup>12</sup> One of Kymlicka's key innovations was the demarcation of national, indigenous and immigrant minority claims, the latter being described as a right to express cultural identities in the public sphere rather than to set up parallel institutions.<sup>13</sup> Kymlicka also recognised that some historically marginalised groups such as African Americans and the European Roma straddled uneasily the ethnic/national boundary, so that his theory did not offer clear guidance on how to fairly deal with them. Acknowledging this, the following discussion will confine itself to the treatment of post-1945 immigrants and their offspring in the western context.

Another limitation of Kymlicka's theory was the somewhat impressionistic depiction of legal (as opposed to political) dilemmas and responses. This stood out starkly in his analysis of the limits of toleration, based on a differentiation between permissible 'external protections' and unacceptable 'internal restrictions'.<sup>14</sup> Internal restrictions were equated with human rights violations, but there was no explanation about how these should be identified and sanctioned.<sup>15</sup> More recently, Kymlicka has asserted that multiculturalism was unlikely to clash with liberal values due to a broad consensus on the latter's legitimacy and the consolidation of human rights institutions.<sup>16</sup> Whereas the first assumption

---

<sup>12</sup>W Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Clarendon Press, Oxford, 1995).

<sup>13</sup>*ibid* 15.

<sup>14</sup>*ibid* 35–44.

<sup>15</sup>*ibid* 170. This contrasts with Kymlicka's extensive discussion on the legitimacy of federal judicial decisions regarding human rights violations within national minorities.

<sup>16</sup>W Kymlicka, *Multicultural Odysseys: Navigating the New International Politics of Diversity* (OUP, Oxford, 2007) 93.

disregards pervasive disputes on the relative weight and interpretation of liberal principles,<sup>17</sup> the second precludes rather than furthers the critical analysis of rights adjudication. As we will see, similar difficulties have plagued subsequent efforts to build on or refine Kymlicka's proposals.

In order to highlight the importance (as well as the challenge) of incorporating ethnicity as a factor in judicial reasoning, the following section develops my understanding of substantive equality and links it to a moral commitment to avoid the perpetuation of ethnic subordination through adjudication. In Part III I will address four categories of ethnic practices (criminal offences, human rights violations, civil infractions and symbolic identification) and unpack the key normative dilemmas courts are likely to face in each case.

## II. Substantive Equality

The judicial standard of substantive equality is a still-young offspring of the anti-discrimination principle established in domestic and international law over the past half century, mainly as a result of feminist and anti-racist struggles. Early interpretations of this principle stipulated that non-elective characteristics, such as sex and race, should not affect the way people were treated by the state and other powerful actors.<sup>18</sup> Although the aim of the anti-discrimination principle was to create opportunities for disadvantaged social categories, its conception as difference-blindness was also mobilised in legal complaints against policies of positive (or affirmative) action. In addition, it left the door open for the implementation of formally neutral rules and procedures with exclusionary effects.<sup>19</sup> In response, courts started to develop more context-sensitive and result-oriented anti-discrimination standards, which allowed for the justified consideration of immutable personal characteristics in judicial cases. In the European context, these 'substantive equality' approaches currently take various forms. While some courts merely require differential treatment to be rationally supported by a legitimate aim, others focus on the universal distribution of important public goods, the prevention and correction of status harms or the general duty of public and private organisations to promote equal opportunities.<sup>20</sup>

In an influential attempt to unify and justify these standards, Fredman has advanced that the differential treatment of subordinated social categories can be regarded as substantive equality when it benefits them on four interrelated dimensions: redistribution, recognition, transformation and participation. Redistribution is primarily concerned with resources and benefits, including representation in jobs, pay levels and access to credit and property. Recognition refers to the elimination of status-based stereotyping, humiliation and violence. Transformation aims to remove historically biased institutions that turn differences into a detriment. As for participation, it relates to the inclusiveness of political and other spheres of decision-making where minorities have traditionally been absent.<sup>21</sup>

<sup>17</sup>P Bosset, 'Complex Equality, Ambiguous Freedoms: Lessons from Canada (and Québec) on Human Rights in Plural Societies' (2011) 29(1) *Nordic J of Human Rights* 448.

<sup>18</sup>P Brest, 'Foreword: In Defense of the Antidiscrimination Principle' (1976) 90(1) *Harvard L Rev* 1–54.

<sup>19</sup>O Fiss, 'Groups and the Equal Protection Clause' (1976) 5(2) *Philosophy & Public Affairs* 107.

<sup>20</sup>C McCrudden and S Prechal, *The Concepts of Equality and Non-Discrimination in Europe: A Practical Approach* (European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities, 2009).

<sup>21</sup>S Fredman, *Discrimination Law* (2nd edn OUP, Oxford, 2011) 25–33.

In many ways, this morally appealing framework evokes the complex conceptions of social justice propounded by critical theorists such as Young and Fraser since the 1990s.<sup>22</sup> According to these thinkers, earlier theories focusing on the exercise of civil liberties and the distribution of material goods<sup>23</sup> failed to bring into view other decisive sources of unequal freedom, above all the stereotypes and discrimination attached to characteristics such as sex, race, sexual orientation, sexual identity, disability and age. In order to redress such injustices, public bodies had a moral duty to modify cultural values that systematically hampered the social participation of stereotyped groups.<sup>24</sup> Since material deprivation, biased institutions and powerlessness generally contributed to the perpetuation of status inequalities, these should also be addressed, together with the 'intersectional' disadvantages experienced by individuals belonging to multiple stigmatised social categories.<sup>25</sup>

The conditions thus giving rise to claims of recognition have many parallels in the situation of western immigrants and their descendants, as current sociological research suggests. The 'outsider' status of recent arrivals, compounded by their legal subordination, political exclusion and economic exploitation,<sup>26</sup> often crystallises in ideologies that magnify their differences in order to legitimate their domination.<sup>27</sup> A range of ethnic cues, especially race, dress, religious practices, accent, place of residence, and name, become a basis for systematic discrimination in everyday interactions.<sup>28</sup> Be they blatant or subtle, these micropatterns eventually burden immigrants' economic incorporation, political participation, educational achievement, social inclusion and psychological adaptation.<sup>29</sup> While some of them capitalise on family and other resources to get ahead in society, others are condemned to live at the margins and pass on the stigma to future generations.<sup>30</sup>

Despite these circumstances, the inclusion of ethnicity among the morally objectionable grounds of discrimination could be rejected on the basis that, unlike the other characteristics, it can and does change over time, in a largely inevitable process of assimilation that may sometimes facilitate socioeconomic mobility.<sup>31</sup> Immigrants and their children commonly trade foreign-sounding names for local ones, learn mainstream dialects, move to middle-class neighbourhoods, adopt conventional dress codes, privatise, adjust or

<sup>22</sup> Marion Young, *Justice and the Politics of Difference* (Princeton University Press, Princeton, 1990); N Fraser, 'From Redistribution to Recognition? Dilemmas of Justice in a Post-Socialist Age' (1995) 1(212) *New Left Rev* 1.

<sup>23</sup> J Rawls, *A Theory of Justice* (revised edn OUP, Oxford, 1999).

<sup>24</sup> N Fraser, 'Rethinking Recognition' (2000) 3 *New Left Rev* 113.

<sup>25</sup> MJ Anón Roig, 'The Antidiscrimination Principle and the Determination of Disadvantage' (2014) 2 *The Age of Human Rights J* 109; K Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' [1989] *The University of Chicago Legal Forum* 139.

<sup>26</sup> J de Lucas, 'La herida original de las políticas de inmigración. A propósito del lugar de los derechos humanos en las políticas de inmigración' (2002) 26 *Isegoría* 59.

<sup>27</sup> A Rea and M Tripiér, *Sociologie de l'immigration* (La Découverte, 2003) 77–91.

<sup>28</sup> M Banton, 'The Sociology of Ethnic Relations' (2008) 31(7) *Ethnic and Racial Studies* 1267.

<sup>29</sup> A Portes and R Rumbault, *Immigrant America: A Portrait* (3rd edn University of California Press, London, 2006); M Martiniello and J Rath, *An Introduction to Immigrant Incorporation Studies: European Perspectives* (Amsterdam University Press, Amsterdam, 2014); K Fangen, T Johansson and N Hammarén (eds), *Young Migrants: Exclusion and Belonging in Europe* (Palgrave Macmillan, Basingstoke, 2012).

<sup>30</sup> On the social position of the second generation, see M Crul and H Vermeulen, 'The Second Generation in Europe' (2003) 37(4) *International Migration Rev* 965; A Heath, C Rothson and E Kilpi, 'The Second Generation in Western Europe: Education, Unemployment, and Occupational Attainment' (2008) 34 *Annual Rev of Sociology* 211; A Portes, P Fernández-Kelly and W Haller, 'The Adaptation of the Immigrant Second Generation in America: A Theoretical Overview and Recent Evidence' (2009) 35(7) *J of Ethnic and Migration Studies* 1077.

<sup>31</sup> H Gans, 'Acculturation, Assimilation and Mobility' (2007) 30(1) *Ethnic and Racial Studies* 152.



abandon their religious practices, and otherwise become indistinguishable from the rest of the population.<sup>32</sup> After some generations, they may even forget about their foreign origins, which cease to play any role in their self-understanding.<sup>33</sup> Of course, an exception would need to be made for race, the ethnic marker *par excellence*, which is not amenable to this sort of adaptation. But this, critics would say, only reinforces the point: rather than getting distracted by culture, defenders of social justice should focus their efforts on the 'real' problem of racism.

The mutability of ethnic practices certainly offers a convincing reason to avoid putting them on the same legal footing as sex, race, sexual orientation, sexual identity, disability, or age. In fact, and despite the frequent mention of ethnicity alongside these other prohibited grounds of discrimination in treaties and statutes, multiculturalist philosophers invariably accept that not all its manifestations deserve accommodation. On the contrary, it is taken for granted that some of them might collide with basic moral principles and should thus be discouraged or even outlawed.

Nevertheless, at least three weighty arguments support the limited, but freestanding, protection of ethnicity through substantive equality standards. First, there are practical, cognitive, and affective limits to individuals' capacity to acculturate. Foreign names, surnames and accents cannot be changed easily; ethnic solidarities often provide much-needed social capital for newcomers; and disengagement from one's cultural heritage has been linked to a number of psychosocial problems.<sup>34</sup> Second, transnational commitments and deterritorialised identities are an inevitable by-product of global flows in goods, services, ideas and people.<sup>35</sup> While some of their manifestations might need to be regulated in the interest of national and local communities, their existence should be accepted as a normal fact of life. Third, the partial overlap between national, linguistic, religious and racial identities frequently leads to a self-reinforcing cycle of ethnic subordination and racialisation.<sup>36</sup> An illustration of this can be found in the various labels currently attached to European Muslims, alternatively referred to as 'Arabs', 'Turks', 'Pakistanis', 'Maghrebis' and so on.<sup>37</sup> To avoid the transformation of ethnocentrism into full-fledged racism, the disproportionate exclusion of immigrants and their children from social, educational, economic and political institutions should be forestalled by all available means.

The substantive equality justification for ethnic accommodation partly diverges from other prominent approaches that focus on the value of cultural diversity, sense of group

<sup>32</sup>E Morawska, 'In Defense of the Assimilation Model' (1994) 13(2) *J of American Ethnic History* 76; R Alba and V Nee, *Remaking the American Mainstream: Assimilation and Contemporary Immigration* (Harvard University Press, Cambridge, Mass., 2003).

<sup>33</sup>H Gans, 'The Coming Darkness of Late-Generation European American Ethnicity' (2014) 37(5) *Ethnic and Racial Studies* 757.

<sup>34</sup>J Berry, 'Stress Perspectives on Acculturation' in D Sam and J Berry (eds), *The Cambridge Handbook of Acculturation Psychology* (CUP, Cambridge, 2006); J Phinney and others, 'Ethnic Identity, Immigration, and Well-Being: An Interactional Perspective' (2001) 57(3) *J of Social Issues* 493; K Chun, P Balls Organista and G Martin (eds), *Acculturation: Advances in Theory, Measurement and Applied Research* (American Psychological Association, Washington, D.C., 2003).

<sup>35</sup>P Levitt and N Glick Schiller, 'Conceptualizing Simultaneity: A Transnational Social Field Perspective on Society' (2004) 38 (3) *International Migration Rev* 1002; K Knott and S McLoughlin (eds), *Diasporas: Concepts, Intersections, Identities* (Zed Books, London, 2010); T Faist, 'Diversity: A New Mode of Incorporation?' (2009) 32(1) *Ethnic and Racial Studies* 171.

<sup>36</sup>Settles and N Buchanan, 'Multiple Groups, Multiple Identities, and Intersectionality' in V Benet-Martínez and YY Hong, *The Oxford Handbook of Multicultural Identity* (OUP, Oxford 2014); M Banton, 'A Theory of Social Categories' (2011) 45(2) *Sociology* 187; A Wimmer, 'The Making and Unmaking of Ethnic Boundaries: A Multilevel Process Theory' (2008) 113(4) *American J of Sociology* 970.

<sup>37</sup>D Goldberg, 'Racial Europeanization' (2006) 29(2) *Ethnic and Racial Studies* 331; N Meer, 'Racialization and Religion: Race, Culture and Difference in the Study of Antisemitism and Islamophobia' (2013) 36(3) *Ethnic and Racial Studies* 385.



belonging, individual conscience or self-esteem.<sup>38</sup> However, it resonates with the egalitarian thrust of Kymlicka's theory and has been gaining ground in political philosophy.<sup>39</sup> Moreover, this article assumes that it provides an appropriate framework for the protection of religious practices, which have traditionally enjoyed stronger constitutional and international safeguards than other manifestations of cultural difference. Apart from reflecting a critical shift in moral and legal philosophy,<sup>40</sup> this will circumvent the intractable problem of determining whether a given practice is 'merely' cultural or 'authentically' religious. From the perspective of substantive equality, it is the stigma attached to these identities that makes them significant, since it exposes their bearers to systematic discrimination and reduced autonomy. Starting from this premise, the following section will examine how courts should incorporate it into a range of cases that concern ethnic practices.

### III. Incorporating Substantive Equality in Legal Reasoning

Conceptually, a 'lexical order' precedes my classification of ethnic practices. I thus assume that criminal offences will be treated within the framework of the criminal law, regardless of whether they also constitute human rights violations (as is often the case) or civil infractions. Symbolic identification is usually adjudicated after being sanctioned as a civil infraction, of which it constitutes a specific and lexically prior subcategory. Finally, courts may ban a practice in the light of constitutional or international human rights standards when neither criminal nor civil laws have already done so.

#### (i) Criminal offences

In western legal systems, ethnic practices that come into conflict with the criminal law generally leave a small margin for judicial accommodation. Cultural issues have nonetheless arisen in cases of female genital mutilation, marital rape and violence, honour killings, child abuse, animal maltreatment and drug possession or trade, among others. While some practices are closely linked to a specific geographic, national or religious background, others largely transcend such boundaries. Their ethnic component derives from the particular circumstances in which they take place, which may align them with the norms of the offender's family or community.<sup>41</sup>

<sup>38</sup>B Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory* (Macmillan, Basingstoke, 2000); A Eisenberg, *Reasons of Identity: A Normative Guide to the Political & Legal Assessment of Identity Claims* (OUP, Oxford, 2009); A Robinson, *Multiculturalism and the Foundations of Meaningful Life: Reconciling Autonomy, Identity and Community* (UBC Press, Vancouver, 2007); C Taylor, 'The Politics of Recognition' in A Gutmann (ed), *Multiculturalism: Examining the Politics of Recognition* (Princeton University Press, Princeton, 1994); A Honneth, *The Struggle for Recognition: The Moral Grammar of Social Conflict* (Polity Press, Cambridge, 1995).

<sup>39</sup>W Kymlicka, 'The Theory and Practice of Immigrant Multiculturalism', in *Politics in the Vernacular: Nationalism, Multiculturalism, and Citizenship* (OUP, 2001).

<sup>40</sup>See J Rawls, *Political Liberalism* (Columbia UP, New York, 1993); J Habermas, *Between Naturalism and Religion* (Polity Press, Cambridge, 2008) 251–70; K Alidadi and MC Foblets, 'Framing Multicultural Challenges in Freedom of Religion Terms: Limitations of Minimal Human Rights for Managing Religious Diversity in Europe' (2012) 30(4) *Netherlands Q of Human Rights* 460; H Bielefeldt, 'Misperceptions of Freedom of Religion or Belief' (2013) 35 *Human Rights Q* 33; A Scolnicov, *The Right to Religious Freedom in International Law: Between Group Rights and Individual Rights* (Routledge, Abingdon, 2011).

<sup>41</sup>J Van Boeck characterises a cultural offence as 'an act by a member of a minority culture, which is considered an offence by the legal system of the dominant culture. The same act is nevertheless, within the cultural group of the offender, condoned, accepted as normal behaviour and approved or even endorsed and promoted in the given situation': see 'Cultural Defence and Culturally Motivated Crimes (Cultural Offences)' (2001) 9(1) *Eur J of Crime, Crim L and Crim Justice* 1, 5.

Multiculturalist philosophers have been slow in confronting criminal law issues. This is hardly surprising, given their overriding interest in dispelling the notion that minority cultures pose a threat to public order or values. Normative dilemmas have thus often been dispatched through the classically liberal, but notoriously slippery, harm principle. For example, Modood postulates that cultural tolerance should not 'cause harm to others', arguing that moral requirements set limits to such things as child sacrifice, cannibalism and widow self-immolation. He also concedes that 'what this means in practice will sometimes be unclear and contested'.<sup>42</sup> Similarly, in his comparison of female genital mutilation and other bodily alterations such as breast enlargement, liposuction, facelift and piercing, Carens concludes that the former should be prohibited because of its health risks. As one moves from infibulation to superficial forms of circumcision, however, the moral judgments become less obvious.<sup>43</sup> Eisenberg also argues that the harm principle is a hurdle that cultural practices must overcome in order to benefit from an accommodation. Given that 'all sorts of harmful or otherwise objectionable practices might nonetheless be viewed as important to a group's identity and even validated by the group',<sup>44</sup> she then adds that institutions should remain vigilant about the reasons, evidence, and criteria by which harm is assessed. In an attempt to limit the discriminatory stretching of the concept, Renteln proposes to circumscribe it to the domain of irreparable physical harm, which would primarily include loss of life and permanent disfigurement.<sup>45</sup>

References to the harm principle as the ultimate frontier of cultural accommodation seem to rest on a distorted understanding of the role it plays in criminal law. In its original form, it was formulated as a reaction to states' excessive recourse to legal coercion. Seeking to keep state power within moral limits, Mill advanced that the only purpose for which it could rightfully be exercised over any member of a civilised community against her will was to prevent harm to others. This doctrine left out of legislators' legitimate reach such matters as self-inflicted injuries, subjective happiness or personal morality (at least in the case of an otherwise healthy adult).<sup>46</sup> In this sense, the harm principle aimed to pinpoint actions that should not be criminalised rather than those that should; it had an exclusive, not an inclusive character.<sup>47</sup> Contemporary theorists likewise agree that the vast majority of wrongs should be addressed with less intrusive means than the criminal law.<sup>48</sup> Paradoxically, multiculturalists who require ethnic cultures to be harmless thus end up advocating a more punitive stance than the prevailing one.

A correct interpretation of the harm principle might be used to support the decriminalisation of apparently benign practices such as the use of soft drugs. For democratic reasons, however, decisions about which harms are serious enough to entail criminal sanctions are generally left to legislatures rather than criminal courts.<sup>49</sup> As recently

<sup>42</sup>T Modood, *Multiculturalism: A Civic Idea* (Polity Press, Cambridge, 2007), 67.

<sup>43</sup>J Carens, *Culture, Citizenship and Community: A Contextual Exploration of Justice as Evenhandedness* (OUP, Oxford, 2001) 147–48.

<sup>44</sup>Eisenberg, *Reasons of Identity* (n 38) 38.

<sup>45</sup>A Renteln, *The Cultural Defense* (OUP, Oxford, 2004) 218.

<sup>46</sup>JS Mill, *On Liberty* (1859) cited in HLA Hart, *Law, Liberty and Morality* (OUP, Oxford, 1963) 4.

<sup>47</sup>J Feinberg, *The Moral Limits of the Criminal Law: Harm to Others* (OUP, Oxford, 1984) 4; A Brudner, 'Agency and Welfare in the Penal Law' in S Shute, J Gardner and J Horder (eds) *Action and Value in Criminal Law* (Clarendon Press, 1993) 21–22.

<sup>48</sup>A Ashworth, *Principles of Criminal Law* (5th edn OUP, Oxford, 2006) 22–55.

<sup>49</sup>This is not to say that no constitutional limit should be set on the validity of culturally connoted criminal laws. However, this is unlikely to happen during criminal proceedings, due to the high costs in terms of legal certainty. The democratic failings that might justify the nullification of a biased criminal statute are addressed in the section on civil infractions.

acknowledged in an outstanding discussion by Kymlicka and colleagues, judicial dilemmas therefore do not hinge on the consequences of particular traditions, but on the determination of defendants' blameworthiness. Together with a host of other circumstances, cultural information can be critical in order to establish general defences such as those of mistake, provocation, duress, necessity, and self-defence, which can lead to complete acquittal, conviction for a lesser wrong or sentence mitigation.<sup>50</sup>

The problem is that many jurisdictions make it extremely difficult for defendants to successfully introduce this information in court. Apart from general procedural issues, such as the admissibility of expert testimonies, the main obstacle has been the subordination of justifications and excuses to objective standards of 'reasonableness' that usually reflect judges' own cultural background. For instance, a Mexican-American man who shot and killed an indebted poker partner after being told in Spanish to 'fuck [his] mother' (*chinga tu madre*) was denied a provocation excuse that would have reduced his conviction from murder to manslaughter, since the average American would not have been so offended by the insult.<sup>51</sup> Cultural norms can also bear on the judgement of crimes whose definition includes a specific intent, as is sometimes the case for sexual abuse (sexual gratification) and assault (inflict physical harm). Failure to consider the diverging meaning of a given action in different cultures could lead courts to take this intent for granted, hence finding guilt when there is none. Such misunderstandings have arisen in several cases involving parenting methods, including the touching of a child's genitals, ritual scarification and the use of traditional medicine.<sup>52</sup>

While there may be good reasons to avoid a purely subjective approach to the assessment of blameworthiness, including citizens' long-term duty to foresee and avert possible harms,<sup>53</sup> there is no obvious one to consider ethnicity-influenced mental states as less reasonable than the rest. To the extent that courts routinely adjust their standards of reasonableness to defendants' situation, which may include their profession, experience, age and so on,<sup>54</sup> ethnicity should be explicitly taken into account among the factors that can shape cognitive, affective, and behavioural patterns.<sup>55</sup>

This being said, the admission of cultural evidence in criminal trials does not come without risks. Apart from the question of legal universalism, which loses much of its urgency once equality is seen as a substantive rather than merely procedural principle, Phillips identifies three mutually reinforcing objections. First, since judges rarely have an in-depth knowledge of ethnic groups' internal norms and dynamics, culture can easily be manipulated opportunistically. Second, successful cultural defences might increase the vulnerability of those individuals – often minority women – who are harmed by the practice. Third, they might expose non-western cultures to judicial stereotyping as violent, irrational, patriarchal, or otherwise uncivilised.<sup>56</sup> This would be an ironic

<sup>50</sup>W Kymlicka, C Lernerstedt and M Matravers, *Criminal Law and Cultural Diversity* (OUP, Oxford, 2014).

<sup>51</sup>A Renteln, 'The Use and Abuse of the Cultural Defense' in MC Foblets and Renteln (eds), *Multicultural Jurisprudence: Comparative Perspectives on the Cultural Defense* (Hart, Oxford, 2009) 65–66.

<sup>52</sup>A Renteln, *The Cultural Defense* (OUP, Oxford, 2004) 48–72.

<sup>53</sup>G Fletcher, *Rethinking Criminal Law* (OUP, Oxford, 2000) 691–736; Ashworth, *Principles of Criminal Law* (n 48) 241–48.

<sup>54</sup>J Blomsma, *Mens Rea and Defences in European Criminal Law* (Intersentia, Cambridge, 2012) 54–58.

<sup>55</sup>See K Greenawalt, 'The Cultural Defense: Reflections in Light of the Model Penal Code and the Religious Freedom Restoration Act' in Kymlicka et al, *Criminal Law and Cultural Diversity* (n 50) 153–76.

<sup>56</sup>A Phillips, *Multiculturalism Without Culture* (Princeton University Press, Princeton, 2007) 79–82.

twist of fate, given multiculturalists' central concern with the elimination of ethnic prejudice and discrimination.

Based on a review of American and British cases, Phillips convincingly shows these fears to be well founded. In fact, she notes, the most successful defences have been those where the minority culture was depicted in patriarchal terms. The persuasiveness of such portrayals seemed to rest on their affinity with widely held postcolonial or Orientalist worldviews, but also with judges' own social environment: what mattered was thus not 'difference but sameness'.<sup>57</sup> This is compounded by the fact that discrepancies between foreign social practices and legal norms are easily overlooked in favour of the former, leading to an overestimation of official support for illegal or waning traditions.<sup>58</sup> Expert witnesses or community elders can sometimes exacerbate the problem by offering excessively conservative portrayals of prevailing customs.

Taken together, these insights point to the need for a procedural safeguard against the admission of cultural evidence on discriminatory norms, with a view to reconcile the pursuit of substantive equality for ethnic and other subordinated groups. For instance, courts could refuse to consider arguments based on the premise that the defendant's culture attributes a given social role to women, children or elders, or that it condemns specific sexual orientations or identities. They could also reject as unreasonable any cognitive or affective pattern stemming from such assumptions. Cultural defences would thus have to rely on traditions and ideologies that can be reconciled with principles of equal human dignity and freedom.

Of course, this might initially seem counterintuitive: so many of our ideas about cultural difference have to do with gender norms that their wholesale exclusion would apparently come close to negating the cultural defence altogether. The proposed solution might also convey the reassuring – but grossly mistaken – message that western societies have overcome their gender biases. By singling out ethnicity-based inequalities as more problematic than other variants, the rule would hold minorities to a higher moral standard than the majority. However, these plausible points should not be exaggerated. On the one hand, sexist and other discriminatory norms amount to a relatively small part of the individual differences that may be rooted in a migrant background. On the other hand, the rule would only apply to the very limited range of criminal cases that are presented as culturally determined by the defence or the prosecution. As the next sections will show, this would still leave plenty of room for the legal accommodation of minority gender norms.

Perhaps more fundamentally, the non-admissibility of evidence on culturally specific biases would reflect the current reversal of legislative and judicial approaches to sexist offences. Along with racism, heterosexism and other attitudes included in developing 'hate crime' laws, the sexist underpinnings of harmful practices are increasingly viewed as an aggravating factor rather than a mitigating circumstance or an excuse.<sup>59</sup> In this context, the exclusion of cultural evidence could actually serve defendants' interests by avoiding the unwarranted attribution of biased motives to minority offenders.

---

<sup>57</sup> *ibid* 98.

<sup>58</sup> C Chen, 'A Critique of "Loss of Face" Arguments in Cultural Defense Cases: A Comparative Study' in Foblets and Renteln, *Multicultural Jurisprudence* (n 51) 247–61.

<sup>59</sup> Organization for Security and Cooperation in Europe, *Hate Crime Laws: A Practical Guide* (OSCE Office for Democratic Institutions and Human Rights, Warsaw, 2009).

Considering some courts' propensity to punish them with longer sentences,<sup>60</sup> the ensuing gains in procedural justice might be significant.

## **(ii) Human rights violations**

While many criminal offences can be understood as transgressions of subjective rights, such as the right to life or physical integrity, ethnic practices that do not entail criminal liability might nonetheless violate internationally or constitutionally recognised human rights. Once again, this is most likely to happen where traditions are invoked to subordinate a 'minority within the minority',<sup>61</sup> such as women or homosexuals, and/or suppress dissent. In such cases, courts would presumably have to discourage their perpetuation through less coercive means, such as nullifying a regulation, withholding benefits or awarding damages, even in the absence of any explicit statutory prohibition. Depending on the division of powers within jurisdictions, this could happen either in a specialised constitutional court or in general civil courts interpreting constitutional and international human rights law.

The multiculturalist literature often emphasises the need to balance cultural demands, sometimes conceptualised as minority rights, against respect for (other) fundamental rights. Poulter notes that religious freedom often appears to conflict with other rights, and that significant insight could be gained from the standards embodied in international conventions.<sup>62</sup> Kymlicka also argues that the 'human rights revolution' has constrained as well as stimulated multiculturalism, by requiring groups to advance their claims in the language of liberalism, constitutionalism and equality.<sup>63</sup> Less optimistically, Waldron warns that ethnic assertiveness could multiply cases of 'uncompossibility', whereby non-negotiable rights are claimed that cannot simultaneously be accommodated within a single legal system.<sup>64</sup> Eisenberg reaches the same conclusion from a diametrically opposite perspective, criticising rights-based limits to accommodation for placing damaging pressure on courts whose decisions to choose between competing rights may appear arbitrary or biased.<sup>65</sup> Driven by a preoccupation with gender discrimination, Okin proposes that basic rights to 'personal freedom' and 'legal equality in the most intimate sphere of life' should be guaranteed for all, 'even those who abjure them for themselves'.<sup>66</sup>

In diverse societies, fundamental rights undoubtedly provide a crucial reference point for the construction of a shared public morality and the legitimisation of political institutions.<sup>67</sup> Just like the harm principle, however, they can sometimes obscure rather than illuminate the logic of judicial decisions on cultural accommodation. The image they bring to mind, that of individual citizens pitted against each other over the scope

<sup>60</sup>M Siesling and J Ten Voorde, 'The Paradox of Cultural Differences in Dutch Criminal Law' in Foblets and Renteln, *Multicultural Jurisprudence* (n 51) 164–68.

<sup>61</sup>A Eisenberg and J Spinner-Halev (eds), *Minorities Within Minorities: Equality, Rights and Diversity* (CUP, Cambridge, 2004).

<sup>62</sup>S Poulter, *Ethnicity, Law and Human Rights: The English Experience* (OUP, Oxford, 1998) 118.

<sup>63</sup>Kymlicka, *Multicultural Odysseys* (n 16) 92–93.

<sup>64</sup>J Waldron, 'Cultural Identity and Civic Responsibility' in W Kymlicka and W Norman (eds), *Citizenship in Diverse Societies* (OUP, Oxford, 2000) 159.

<sup>65</sup>Eisenberg, *Reasons of Identity* (n 38) 74.

<sup>66</sup>S Moller Okin, 'Multiculturalism and Feminism: No Simple Question, No Simple Answers' in Eisenberg and Spinner-Halev, *Minorities Within Minorities* (n 61) 87.

<sup>67</sup>Solanes Corella, *Human Rights and Conflicts* (n 7) 70.

of their respective liberties, seldom comes to life in courtrooms. The primary reason for this can be traced back to a basic feature of rights adjudication: in an overwhelming majority of cases, it is concerned with state rather than private action.<sup>68</sup>

The fact that public authorities usually stand accused of human rights violations makes it extremely unlikely for an ethnic tradition to come under scrutiny. For this to happen, the practice would need to be performed by a given authority and then contested in court by its presumed victim. But ethnic minorities, almost by definition, typically lack the power to shape the functioning of public schools, hospitals, social services, police forces, prisons and so on. To be sure, courts have often had to assess tensions between individual rights and state-sponsored religions, but the latter were those of the majority.<sup>69</sup> When minority believers have been involved in human rights litigation, it has almost invariably been as claimants rather than defendants.<sup>70</sup> A noteworthy exception is the case of *Grant v Canada*,<sup>71</sup> where three police veterans challenged a dress code that allowed Sikh officers to wear a religious turban instead of the conventional headgear. The plaintiffs alleged that the exemption was incompatible with the Canadian Charter of Rights since it infringed the religious freedom of citizens who interacted with them and discriminated against their non-Sikh colleagues. The court found no interference with religious freedom and non-discrimination and therefore did not need to determine whether culture could justify it.

This situation is likely to change, however, due to the progressive jurisprudential expansion of rights-based obligations. As state duties of restraint or respect are complemented with those of protection and fulfilment, public authorities are increasingly required to shield individuals against the breach of their rights by private parties.<sup>72</sup> This could open up for the argument that failure to prohibit a given ethnic practice might be in violation of a third party's rights. Courts would thus have to balance, for instance, states' duty to respect minorities' religious freedom and their obligation to protect some other fundamental right. Once again, such an exercise would not be without precedent, since long-established religions have often sought exemptions from regulations aiming to empower children, women, homosexuals or dissenters in general, either among the faithful or in the larger population. The striking overall result of these struggles is that associational autonomy or freedom of conscience has regularly had the upper hand on competing rights to equality, freedom of expression, family life, and so on.<sup>73</sup>

<sup>68</sup>Of course, this does not hold for the application of civil laws embodying human rights principles, which are addressed below. See R McCorquodale, 'Non-State Actors and International Human Rights Law' in S Joseph and A McBeth (eds), *Research Handbook on International Human Rights Law* (Edward Elgar, Cheltenham, 2010) 97–114; F Michelman, 'Constitutions and the Public/Private Divide' in M Rosenfeld and A Sajó, *The Oxford Handbook of Comparative Constitutional Law* (OUP, Oxford, 2012).

<sup>69</sup>For recent ECtHR cases, see *Folgerø and Others v Norway* App no 15472/02 (ECtHR 29 Jun 2007); *Lautsi v Italy* App no 30814/06 (ECtHR 3 Nov 2009); *Lautsi and Others v Italy* App no 30814/06 (ECtHR 18 Mar 2011).

<sup>70</sup>See inter alia *Choudhury v United Kingdom* App no 17439/90 (Commission Decision, 5 Mar 1991); *Dahlab v Switzerland* App no 42393/98 (ECtHR 15 Feb 2001); *Dogru v France* and *Kervanci v France* Ap no 27058/05 and 31645/04 (ECtHR 4 Mar 2009).

<sup>71</sup>[1995] 1 FC 158.

<sup>72</sup>S Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP, Oxford, 2008) 65–91.

<sup>73</sup>A McColgan, 'Religion and (In)equality in the European Framework' in L Zucca and C Ungureanu (eds), *Law, State and Religion in the New Europe: Debates and Dilemmas* (CUP, Cambridge, 2012); K Greenawalt, *Religion and the Constitution: Free Exercise and Fairness* (Princeton University Press, Princeton, 2006).



However, growing anxieties about radical Islam are currently putting pressure on such extensive interpretations of religious freedom, especially in Europe.<sup>74</sup> For instance, the European Court of Human Rights has drawn a clear line between the absolute 'internal' dimension of religious freedom and its much more qualified 'external' counterpart, which can easily be curtailed in the name of legitimate interests (such as the good functioning of a public or private organisation).<sup>75</sup> As a result, it has so far refused to order religious exemptions from general laws, except in cases of conscientious objection to military service.<sup>76</sup> Concurrently, the EU employment equality directive has significantly narrowed the legal space for discrimination in religious bodies, such as private schools and hospitals, despite an ambiguous provision allowing them to 'require their employees to act in good faith and with loyalty to the organisation's ethos'.<sup>77</sup>

To the extent that it contributes to removing some of the structural limitations on autonomy that subordinated social categories, including believers, encounter in various spheres of life, this shift should be promoted as a step in the direction of substantive equality.<sup>78</sup> In all western societies, religious organisations wield significant power as employers, providers of public services, coordinators of civil society, owners of media outlets and promoters of cultural heritage.<sup>79</sup> Because of their wide reach, any institutionalised bias in their mode of functioning is bound to have a real impact on individual citizens' economic opportunities, political influence and social status.<sup>80</sup> Even from the perspective of minority religions, it is hard to see how their image could be improved by allowing influential members to put illiberal doctrines into practice. This being said, it should be born in mind that states' legal duty to protect is a progressive one and does not always entail the imposition of sanctions on individuals or private organisations. Therefore, traditional norms may sometimes be allowed to interfere with individual rights regardless of religious freedom concerns. For instance, anti-discrimination laws usually leave out non-contractual interpersonal relationships and membership requirements in civil society organisations. Where such exemptions exist, religious individuals and bodies should enjoy the same leeway as secular ones until higher standards are enacted.

Notwithstanding the aforementioned correlation between private rights and public duties, it cannot be ruled out that courts might also face the task of balancing the protection of ethnicity and individual rights in a private dispute. A number of constitutions explicitly recognise rights' horizontal enforceability against private parties, either as a general rule, an exception, or when there is a legislative 'gap'. When such a mention is

<sup>74</sup>M Malik, 'The "Other" Citizens: Religion in a Multicultural Europe' in Zucca and Ungureanu, *Law, State and Religion* (n 73); M Maussen and V Bader, 'Non-Governmental Religious Schools in Europe: Institutional Opportunities, Associational Freedoms, and Contemporary Challenges' (2015) 51(1) *Comparative Education* 1.

<sup>75</sup>European Court of Human Rights Research Division, *Overview of the Court's Case-law on Freedom of Religion* (Council of Europe 2013) [16].

<sup>76</sup>ECtHR, *Guide sur l'article 9: Liberté de pensée, de conscience et de religion* (Council of Europe, 2015) [52]–[61], [64].

<sup>77</sup>Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/16, art 4.2. For a critical discussion, see L Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (Hart, 2008) 54–78.

<sup>78</sup>M Sunder, 'Keeping Faith: Reconciling Women's Human Rights and Religion' in J Witte and C Green (eds), *Religion & Human Rights: An Introduction* (OUP, Oxford, 2011).

<sup>79</sup>For some examples, see F Messner and P Shah (eds), *Public Funding of Religions in Europe* (Ashgate, Farnham, 2015).

<sup>80</sup>MC Foblets, K Alidadi, J Nielsen and Z Yanasmayan (eds), *Belief, Law and Politics: What Future for a Secular Europe?* (Ashgate, Farnham, 2014).



absent, human rights can still be used as a guide to interpret private law.<sup>82</sup> Even in the United States and Canada, where constitutional guarantees are explicitly restricted to 'state action', these innovations are already influencing family law, the focal point of a vigorous debate about the recognition of religious forms of divorce.<sup>83</sup> In 2007, a Maryland court refused to enforce a *talaq* divorce performed at the Pakistani embassy in Washington on the grounds that it did not confer sufficient due process to the wife.<sup>84</sup> The same approach was adopted two years later by the Oakland Circuit Court, which rejected an Indian *talaq* despite the fact that the couple had only lived in the US for two years.<sup>85</sup>

The incipient character of such rights-based restrictions on contractual freedom precludes any definitive assessment as to their long-term impacts on substantive equality. To the extent that they considerably expand the scope of judicial discretion, however, there is a possibility that stereotypes and misunderstandings might lead to the prohibition of harmless or largely beneficial practices among ethnic minorities. Some signs of this are already emerging. In France and Belgium, formalist interpretations of gender equality have made it extremely difficult for Muslim foreign nationals, including women, to obtain recognition of an international divorce.<sup>86</sup> In the Netherlands and other places, fears of maltreatment or abduction have led courts to withdraw child custody from minority fathers, undermining family bonds and paradoxically reinforcing traditional gender roles.<sup>87</sup> Measures against forced marriages have also served to restrict young adults' access to family reunification.<sup>88</sup> If these trends persist, the double-edged sword of human rights runs the risk of falling in the hands of the powerful, striking against those it was forged to protect.

### (iii) Civil infractions

Conflicts between ethnic norms and civil regulations are by far the most frequently discussed in multiculturalist theory, to the point of eclipsing criminal and human rights issues. Such frictions are also the most likely to arise, given the sheer number of rules that are adopted, amended and suppressed every day in the array of public and private organisations that educate, heal, entertain, protect, feed or inform citizens. Unlike criminal and constitutional provisions, these rules typically lack intrinsic moral status. Their *prima facie* legitimacy flows from the way in which they are adopted, either by a democratically accountable body or a legally authorised contracting party. Since they mainly address

<sup>82</sup>D Oliver and J Fedtke, *Human Rights and the Private Sphere: A Comparative Study* (Routledge, Abingdon, 2007) 467–511; C O'Connell and M Stelzer, 'Horizontal Effect/State Action' in M Tushnet, T Fleiner and C Saunders (eds), *Routledge Handbook of Constitutional Law* (Routledge, Abingdon, 2013).

<sup>83</sup>P Bosset and P Eid, 'Droit et religion: de l'accommodement raisonnable à un dialogue internormatif?' (2007) 41 *Revue juridique Thémis* 513; A Shachar, 'State, Religion, and the Family: The New Dilemmas of Multicultural Accommodation' in R Ahdar and N Aroney (eds), *Shari'a in the West* (OUP, Oxford, 2010); J Nichols, 'Multi-Tiered Marriage: Reconsidering the Boundaries of Civil Law and Religion', in *Marriage and Divorce in a Multicultural Context: Multi-Tiered Marriage and the Boundaries of Civil Law and Religion* (CUP, Cambridge, 2012).

<sup>84</sup>*Aleem v Aleem*, 404 Md 404 947 A2d 489 (2008).

<sup>85</sup>*Tarikonda v Pinjari* no 287403 (Mich Ct App 2009).

<sup>86</sup>H Fulchiron, 'Ne répudiez point: Pour une interprétation raisonnée des arrêts du 17 février 2004' (2006) 58(1) *Revue internationale de droit comparé* 7; K Alidadi, 'The Western Judicial Answer to Islamic Talaq: Peeking through the Gate of Conflict of Laws in the US and Belgium' (2005) 5(1) *UCLA J of Islamic and Near Eastern Law* 1; MC Foblets, 'Moroccan Women in Europe: Bargaining for Autonomy' (2007) 64(4) *Washington and Lee L Rev* 1385.

<sup>87</sup>P Dupont, 'Del sexismo islámico al sexismo secular en la resolución de conflictos familiares' in A Solanes Corella (ed), *Diversidad cultural y conflictos en la Unión Europea: Implicaciones jurídico-políticas* (Tirant lo Blanch, Valencia, 2015).

<sup>88</sup>E La Spina, 'Reconocimiento y/o menosprecio hacia los considerados "enemigos culturales" en el contexto migratorio familiar' in Solanes Corella, *Diversidad cultural* (n 87).

problems of coordination in the long-term pursuit of individual or collective goals, any immediate harm caused by their modification will usually be limited in nature.<sup>89</sup>

A non-exhaustive list of ethnic practices that have collided with civil regulations includes withdrawing children from physical or sexual education classes; observing non-official religious holidays and opening businesses on official ones; building places of worship; celebrating festivals in public spaces; objecting to autopsies; performing funerary, hygienic or slaughtering rituals; consuming animals that are usually kept as pets; and entering or maintaining a polygamous marriage.<sup>90</sup> As Bouchard and Taylor usefully point out, only a handful of such incompatibilities make it all the way to a court of justice. The vast majority are dealt with through informal negotiations among the parties concerned, leading either to the adaptation or the uniform application of rules.<sup>91</sup> It is only in the latter scenario that claimants may resort to courts in order to invalidate or be compensated for the regulation. The question then becomes, what are the moral grounds on which such demands can be met? What are the circumstances, if any, when culture cannot only justify but even require differential treatment?

First, let us consider the objections to cultural accommodation in civil cases. In *Culture and Equality*, Barry recalls that any law is bound to disproportionately hurt those who favour the prohibited conduct: for instance, only smokers will have their freedom curtailed by non-smoking restaurants. Therefore, a law's disparate impact is not sufficient reason to reject it as unfair, at least as far as dynamic cultural preferences (as opposed to immutable characteristics, such as disability) are concerned.<sup>92</sup> Admittedly, prudential and ethical considerations might make it advisable to revise procedures which adversely affect a specific group. However, the difficulty of applying different rules to different people would make it preferable to redesign the procedure rather than conceding exemptions. This would remove accommodation claims from the judicial arena and bring them back into a political negotiation where competing interests could be voiced and perhaps reconciled.<sup>93</sup>

Multicultural sceptics have not been alone in advocating political over juridical solutions to cultural conflicts, emphasising the value of communicative processes. In their report, Bouchard and Taylor explicitly favour what they call the 'citizen route' in order to lighten the burden on courts, stimulate individual responsibility and promote exchange and reciprocity.<sup>94</sup> While acknowledging the attractiveness of a legal model that consistently protects vital interests from the vicissitudes of the political process, Williams also concludes that an inclusive dialogue among all affected parties would better serve the interests of justice.<sup>95</sup> Deliberative approaches have likewise been championed as a way of fostering mutual understanding and fair consideration of diverse viewpoints, increasing the legitimacy of governance structures, improving leaders' accountability, redressing imbalances in communicative resources, drawing attention away from abstract principles and toward concrete problems, ensuring the viability of proposed reforms, promoting the

<sup>89</sup>J Raz, *The Authority of Law: Essays on Law and Morality* (OUP, Oxford, 1979) 162–77.

<sup>90</sup>Depending on the jurisdiction, some of these practices may fall in the category of criminal offences. An extensive compilation of ethnicity-related normative conflicts can be found in G Bouchard and C Taylor, *Building the Future: A Time for Reconciliation* (Government of Quebec, 2008) 45–75.

<sup>91</sup>*ibid* 64.

<sup>92</sup>B Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Polity Press, Cambridge, 2001) 34–38.

<sup>93</sup>*ibid* 39–50.

<sup>94</sup>Bouchard and Taylor, *Building the Future* (n 90) 64.

<sup>95</sup>M Williams, 'Justice Toward Groups: Political Not Juridical' (1995) 23(1) *Political Theory* 67.

internal contestation of cultural norms and empowering subordinated group members.<sup>96</sup>

At the same time, many deliberative theorists have acknowledged the structural inequalities that may affect minorities' ability to make themselves heard. For instance, citizens might lack a genuine commitment to the common good and, therefore, the will to moderate or sacrifice their self-interest for the sake of satisfactory long-term arrangements. Socioeconomic disadvantages and limited access to education, technology and the media can hinder minorities' capacity and motivation to advocate their cause in a convincing manner.<sup>97</sup> In the migration context, restrictive citizenship regimes often deprive a large proportion of minority residents from the right to vote.<sup>98</sup> Moreover, their representatives may seek to maintain internal hierarchies and silence the most vulnerable.<sup>99</sup> The results of such pitfalls have been well documented in the literature on integration policy. As long as dominant groups do not perceive ethnic demands as a threat to their interests, decision-makers tend to dismiss them as irrelevant or temporary. In favourable circumstances, this either leads to the absence of policy responses or to paternalistic measures that mainly reflect majority concerns.<sup>100</sup> Despite attempts by academics, elite media, bureaucrats, human rights activists and business representatives to uphold ethnic bashing taboos,<sup>101</sup> mainstream parties frequently end up replicating popular discourses that portray immigrants as salary dumpers, benefit scroungers, cultural aliens or potential criminals.<sup>102</sup> The framing of ethnic problems as security issues in turn legitimises illiberal policies with detrimental effects on intergroup relations, such as the detention of religious leaders, the imposition of compulsory citizenship courses, the introduction of cultural requirements in naturalisation procedures and the large-scale deportation of undocumented residents.<sup>103</sup>

If minority voices are easily stifled in democratic debates, things may get worse in more hierarchical private organisations where cultural diversity is routinely resisted through harassment, normalised discrimination, avoidance and neglect. Instead of preventing

<sup>96</sup>J Valadez, *Deliberative Democracy, Political Legitimacy, and Self-Determination in Multicultural Societies* (Westview Press, Oxford, 2001) 117–45; A Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (CUP, Cambridge, 2004) 117–45; M Deveau, *Gender and Justice in Multicultural Liberal States* (OUP, Oxford, 2006) 89–126; S Song, *Justice, Gender, and the Politics of Multiculturalism* (CUP, Cambridge, 2007) 41–84.

<sup>97</sup>Valadez, *Deliberative Democracy* (n 96) 39–85.

<sup>98</sup>J de Lucas, 'Integración política, participación y ciudadanía: Un balance' (2007) *Entelequia* 271.

<sup>99</sup>Deveau (n 96) 112–19; Song (n 96) 82–84.

<sup>100</sup>H Mahnig, 'The Politics of Minority-Majority Relations: How Immigrant Policies Developed in Paris, Berlin and Zurich' in Penninx and others, *Citizenship in European Cities: Immigrant, Local Politics and Integration Policies* (Ashgate, Aldershot, 2004).

<sup>101</sup>G Freeman, 'Modes of Immigration Politics in Liberal Democratic States' (1995) 29(4) *Intl Migration Rev* 881–902; C Boswell, 'Theorizing Migration Policy: Is There a Third Way?' (2007) 41(1) *Intl Migration Rev* 75; C Boswell, *The Political Uses of Expert Knowledge: Immigration Policy and Social Research* (CUP, Cambridge, 2009); P Scholten and A Timmermans, 'Setting the Immigrant Policy Agenda: Expertise and Politics in the Netherlands, France and the United Kingdom' (2010) 12(5) *J of Comparative Policy Analysis: Research and Practice* 527.

<sup>102</sup>A Ceyhan and A Tsoukala, 'The Securitization of Migration in Western Societies: Ambivalent Discourses and Policies' (2002) 27 *Alternatives: Global, Local, Political* 21; M Schain, 'The Extreme-Right and Immigration Policy-Making: Measuring Direct and Indirect Effects' (2006) 29(2) *West European Politics* 270; T Bale, 'Turning Round the Telescope: Centre-Right Parties and Immigration and Integration Policy in Europe' (2008) 15(3) *J of Eur Public Policy* 315; R Zapata-Barrero, *Fundamentos de los discursos políticos en torno a la inmigración* (Trotta, Madrid, 2009); B Anderson, *Us & Them? The Dangerous Politics of Immigration Control* (OUP, Oxford, 2013).

<sup>103</sup>A Kaya, *Islam, Migration and Integration: The Age of Securitization* (Palgrave Macmillan, Basingstoke, 2009); D McGhee, *The End of Multiculturalism? Terrorism, Integration and Human Rights* (McGraw-Hill, Maidenhead 2008) 50–81; T Triadafilopoulos, 'Illiberal Means to Liberal Ends? Understanding Recent Immigrant Integration Policies in Europe' (2011) 37 (6) *J of Ethnic and Migration Studies* 861; F Adamson, T Triadafilopoulos and A Zolberg, 'The Limits of the Liberal State: Migration, Identity and Belonging in Europe' (2011) 37(6) *J of Ethnic and Migration Studies* 843.

ethnicity-related conflicts, managers often let them simmer or pigeonhole minorities into subordinated units that reduce their influence and possibilities of advancement.<sup>104</sup> When measures are taken to address their concerns and increase their status, majority workers may feel unfairly disadvantaged and stymie change.<sup>105</sup> Depending on the context, union attitudes can range from broadly supportive to blatantly xenophobic.<sup>106</sup>

For all these reasons, deliberations on the adaptation of existing institutions to ethnic claims often fail to deliver fair outcomes. Instead of creating opportunities for mutual understanding and cooperation, they produce dogmatic defences of established conventions and interested distortions of minor differences. To overcome this problem, Levy advocates for the development of multicultural 'manners', understood as an ability to give way, renounce to a legitimate aspiration or accept that losing an argument is not the same as being wrong.<sup>107</sup> Similarly, Laden calls for the substitution of the 'logic of negotiation', where opponents see themselves as obstacles standing in the way of each other's goals, by the 'logic of deliberation', where opposing reasons are thoroughly considered with a view to maximise long-term cooperation.<sup>108</sup> De Lucas vindicates the need to take other cultures seriously and avoid prejudging them as incompatible with established customs, democracy and the rule of law.<sup>109</sup>

Summarising these views, Maclure asserts that the principle of 'respect for reasonable cultural diversity' has entered the liberal egalitarian conception of justice, complementing related rights to freedom of conscience, association and non-discrimination.<sup>110</sup> This principle seems to have made some headway into the legal field, where two key innovations have contributed to improve the deliberative position of ethnic minorities. The first and most decisive is the prohibition of indirect discrimination, alternatively referred to as 'disparate impact' or 'adverse effect' discrimination. Initially formulated by the US Supreme Court interpreting the 1964 Civil Rights Act,<sup>111</sup> the concept was subsequently incorporated into a number of laws, including the EU racial equality directive adopted in 2000.<sup>112</sup> Indirect discrimination is generally defined as a formally neutral practice with a disproportionate (or unjustified) negative impact on a disadvantaged social category.<sup>113</sup> While disparate impact can normally be established straightforwardly through common sense or statistics, court approaches to proportionality have been fluctuating between strict necessity tests and much lighter requirements of a rational link between the practice

<sup>104</sup>K Thomas and V Plaut, 'The Many Faces of Diversity Resistance in the Workplace'; M Davidson and K Proudford, 'Cycles of Resistance: How Dominants and Subordinates Collude to Undermine Diversity Efforts in Organizations' both in K Thomas (ed), *Diversity Resistance in Organizations* (Lawrence Erlbaum, New York 2008).

<sup>105</sup>E James and others, 'Prejudice Matters: Understanding the Reactions of Whites to Affirmative Action Programs Targeted to Benefit Blacks' (2001) 86(6) *J of Applied Psychology* 1120; V Plaut and others, 'What About Me? Perceptions of Exclusion and Whites' Reactions to Multiculturalism' (2011) 101(2) *J of Personality and Social Psychology* 337.

<sup>106</sup>J Wrench, *Diversity Management and Discrimination: Immigrants and Ethnic Minorities in the EU* (Ashgate, Aldershot, 2007) 81–82.

<sup>107</sup>J Levy, 'Multicultural Manners' in Michel Seymour (ed), *The Plural States of Recognition* (Palgrave, New York, 2010).

<sup>108</sup>A Laden, 'Negotiation, Deliberation, and the Claims of Politics' in A Laden and D Owen (eds), *Multiculturalism and Political Theory* (CUP, Cambridge, 2007).

<sup>109</sup>J De Lucas, 'Condiciones jurídicas y políticas del proyecto intercultural en España' (2005) 21 *Anales de Historia Contemporánea* 161.

<sup>110</sup>J Maclure, 'Respect for Reasonable Cultural Diversity as a Principle of Political Morality' in Michel Seymour (ed), *The Plural States of Recognition* (Palgrave, New York, 2010).

<sup>111</sup>United States Supreme Court, *Griggs v Duke Power* (1971) 401 US 424.

<sup>112</sup>Council Directive 2000/43/EC of 29 June 2000, implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L 180/22, art 2(b).

<sup>113</sup>Fredman, *Discrimination Law* (n 21) 178; N Bamforth, M Malik and C O'Cinneide, *Discrimination Law: Theory and Context* (Sweet & Maxwell, London, 2008) 290.

and a legitimate aim.<sup>114</sup> Such assessments usually rely on a highly contextual analysis of the functions performed by an organisation, the social environment in which it is immersed and the predictable consequences of changing its functioning.

The relevance of indirect discrimination for the accommodation of ethnic differences recently came to light in the case of a Danish Muslim who was forced to quit a vocational training programme in nutrition after refusing to taste pork. Filing a claim of discrimination on grounds of religion, she highlighted her willingness to touch and prepare the pork and argued that her beliefs would not interfere with her work, as colleagues would always be there to taste if the need arose. In its ruling, the Danish Equal Treatment Board acknowledged her good faith, stressed that the requirement to eat pork would prevent her from completing her education and concluded that it was not proven to be necessary. The plaintiff was awarded a compensation of €10,000, subsequently reduced to €5,400 by a local city court.<sup>115</sup>

A very similar case was handled in 2006 by the Dutch Equal Treatment Commission, which had to assess the rejection of a Muslim applicant for the job of customer manager who refused to shake hands with women. The employer argued that this would obstruct his relationship with clients. Accepting the link between the applicant's religious beliefs and his opposition to handshakes, the Commission found indirect discrimination on the grounds that other means could have been used to promote customer-friendliness and sexual equality. This conclusion was reached through a highly contextualised demonstration of employer bad faith: no one had ever complained about not receiving a handshake, the business lacked a specific policy on customer treatment and it had failed to consider any alternative mode of interaction. In another case of handshake-related religious discrimination two years later, the Court of Rotterdam took the opposite position, reflecting the fact-sensitive nature of proportionality analyses.<sup>116</sup>

As these cases show, avoiding indirect discrimination often entails allowing an exemption from a general rule or taking specific steps in order to reconcile organisational processes with ethnic norms.<sup>117</sup> This has been the starting point of the reasonable accommodation doctrine, developed through American legislation<sup>118</sup> and adopted by Canadian courts as a complement to the prohibition of religious discrimination.<sup>119</sup> According to this doctrine, public and private bodies have a duty to accommodate practices that do not cause 'undue hardship', an open-ended concept that takes into account the financial costs borne by the organisation, its size and mode of functioning, prevailing security standards, the coordination of human resources and the protection of important public interests.<sup>120</sup> For instance, public authorities or private employers could be required

<sup>114</sup>Bamforth et al (n 113) 313–30; Fredman, *Discrimination Law* (n 21) 183–96.

<sup>115</sup>European Network of Legal Experts in the Non-Discrimination Field, 'News from EU Member States, Croatia, the FYR of Macedonia, Turkey, Iceland, Liechtenstein and Norway' (2012) 15 *Eur Anti-Discrimination L Rev* 43, 53; European Network of Legal Experts (n 2) 56.

<sup>116</sup>C Tobler, *Limits and Potential of the Concept of Indirect Discrimination* (Office for Official Publications of the European Communities, 2008) 64. In 2010, the District Court of Stockholm imposed over €6,000 in damages to the national employment agency for sanctioning an applicant who had refused to shake a prospective employer's hand. European Network of Legal Experts, 'News from the EU Member States' (2013) (n 2) 49, 85.

<sup>117</sup>On the commonality between the prohibition of indirect discrimination and the duty to accommodate, see C Jolls, 'Anti-discrimination and Accommodation' (2001) 115 *Harvard L Rev* 641.

<sup>118</sup>Equal Employment Opportunity Act of 1972, SEC 2.7.

<sup>119</sup>*O'Malley v Simpsons-Sears* [1985] 2 SCR 536.

<sup>120</sup>Bosset and Eid, 'Droit et religion' (n 83).

to provide minority religious classes, confessional schools, prison chaplains, single-sex public pools, foreign-language education or media, translation services, vegetarian, halal or kosher food, separate cemeteries, adapted medical treatments, male or female doctors, teachers or caretakers, or public housing for extended families.<sup>121</sup> While resting on the same concern for reasonableness as the proportionality test, the ‘undue hardship’ test places a greater burden on organisations to think creatively about new rules and methods that might suit minority employees and users. As more substantive conceptions of equality take root in European social and legal norms, however, the distinction between both standards may become increasingly blurred.<sup>122</sup>

Ultimately, the prohibition of indirect discrimination and the duty of reasonable accommodation both oblige decision-makers to devote time and resources to the design of ethnicity-friendly institutions. In this sense, they can go some way in resolving the lack of minority participation that tends to undermine the legitimacy of general regulations in diverse societies. These legal standards do not seek to guarantee a concrete good or right, but to provide minorities with a last-ditch opportunity to express their arguments and receive a fair hearing. After taking into account all the interests at stake, including a wide range of practical concerns and foreseeable effects on third parties, judges try to determine if the plaintiff was treated as an equal or, to put it differently, without prejudice. This is inevitably a delicate exercise, not least because the weight and rationality of defendants’ justifications are typically hard to assess. Moreover, the principle of judicial restraint might make it preferable to err on the side of permissiveness. Even then, the mere possibility of judicial review may put pressure on all organisations to design more inclusive decision-making procedures, for instance by consulting minorities more regularly and ensuring they are adequately represented in senior positions.<sup>123</sup> If only for this reason, the principle of ‘respect for reasonable cultural pluralism’ has an important role to play in the legal theory of substantive equality, along with the other fundamental rights that promote equal-status dialogue and compromise.

#### **(iv) Symbolic identification**

Among all the ethnic practices whose civil prohibition has been contested in court, the display of identity symbols stands out both for the tremendous amount of political attention it has received and the specific normative issues it raises. Markers of ethnicity are regularly used in order to achieve positive distinctiveness, cultivate a sense of historical continuity, command group solidarity, catalyse political mobilisation, take part in cultural traditions and many other reasons. Depending on the function they play, they can be more or less permanent or linked to specific situations such as a family reunion, a religious celebration or a demonstration.<sup>124</sup> Contrary to a long-held view, many studies have shown

<sup>121</sup>Most of these examples are drawn from Bouchard and Taylor, *Building the Future* (n 90) 45–75.

<sup>122</sup>P Bosset, ‘Droits de la personne et accommodements raisonnables: le droit est-il mondialisé?’ (2009) 62 *Revue interdisciplinaire d’études juridiques* 1; MC Foblets, ‘Freedom of Religion and Belief in the European Workplace: Which Way Forward and What Role for the European Union?’ (2013) 13(2-3) *Intl J of Discrimination and the Law* 240; E Ruiz Vieytez, *Las prácticas de armonización como instrumentos de gestión pública de la diversidad religiosa* (Observatorio del Pluralismo Religioso en España, Madrid, 2012) 31–32.

<sup>123</sup>M Jézéquel, ‘The Reasonable Accommodation Requirement: Potential and Limits’ in Council of Europe, *Institutional Accommodation and the Citizen: Legal and Political Interaction in a Pluralist Society* (Council of Europe Publishing, Strasbourg, 2009) 21.

<sup>124</sup>M Verkuyten, *The Social Psychology of Ethnic Identity* (Psychology Press, 2005) 74–90.



that ethnic identification often goes hand in hand with a strong willingness to participate in the wider society. In this sense, ethnic and national identities should be seen as separate constructs whose mutual influence depends on a number of contextual variables, such as social expectations, institutional arrangements and discrimination.<sup>125</sup> Symbolic ethnicity also tends to endure much longer than more demanding cultural commitments, such as political activism or active engagement in religious, educational or folklore associations.<sup>126</sup>

To the extent that ethnic self-identification largely boils down to intangible concerns about seeing and being seen, it is striking to see how much hostility it has aroused in western societies. Foreign-language commercial signs, minarets and sukkahs (temporary huts built outside homes to celebrate the Jewish festival of Sukkot) are some of the visible ethnic manifestations that have met with resistance from public authorities and ordinary citizens. However, most of the controversies have focused on the even more “purely” symbolic aspect of ethnic dress or styles, including Sikh turbans, Jewish yarmulkes, Rastafarian dreadlocks and, over and above all, Muslim veils. Despite their differences, debates on these practices tend to mobilise highly speculative arguments tied to national ideologies and ‘philosophies of integration’.<sup>127</sup> Moreover, these arguments have not only sought to maintain existing norms but also to impose new requirements of cultural assimilation.

Because of its protracted nature and regressive outcome, the French headscarf controversy is especially illustrative in this respect.<sup>128</sup> The nationwide debate broke out in 1989, when three Muslim girls were expelled from a secondary school for wearing the veil. This triggered a series of statements on French identity and Islam, spurring the Minister of Education to request an advisory opinion from the State Council. The corresponding ruling stated that religious symbols worn by students in public schools did not compromise state secularism and should thus be allowed unless they disrupted educational activities, or were used in a conspicuous manner to proselytise or protest. Educational authorities had to determine the presence of such factors on a case-by-case basis.<sup>129</sup>

In 2003, an expert commission was appointed to carry out audiences and provide recommendations on the principle of secularism. Its final report prescribed a mix of pragmatic accommodation (in canteen menus, history classes and official holidays, for instance) and hard-line republicanism, most notably by prohibiting “conspicuous” religious symbols in public schools.<sup>130</sup> The latter recommendation was followed through with the law of 15 March 2004 regulating, in application of the principle of secularism, the wearing of signs or clothes displaying a religious affiliation in public primary and

<sup>125</sup>J Berry, ‘Immigration, Acculturation, and Adaptation’ (1997) 46(1) *Applied Psychology* 5; S Schwartz and others, ‘Rethinking the Concept of Acculturation: Implications for Theory and Research’ (2010) 65(4) *American Psychologist* 237.

<sup>126</sup>H Gans, ‘Symbolic Ethnicity: The Future of Ethnic Groups and Cultures in America’ (1979) 2(1) *Ethnic and Racial Studies* 1.

<sup>127</sup>A Favell, *Philosophies of Integration: Immigration and the Idea of Citizenship in France and Britain* (2nd edn Palgrave Macmillan, Basingstoke, 2001); C Bertossi, ‘National Models of Integration in Europe: A Comparative and Critical Analysis’ (2011) 20(10) *American Behavioral Scientist* 1.

<sup>128</sup>For detailed descriptions of these events, see P Simon and V Sala Pala, ‘We’re Not All Multiculturalists Yet’ in S Vertovec and S Wessendorf (eds), *The Multiculturalism Backlash: European Discourses, Policies and Practices* (Routledge, Abingdon, 2010); R Kastoryano, ‘French Secularism and Islam: France’s Headscarf Affair’ in T Modood, A Triandafyllidou and R Zapata-Barrero (eds), *Multiculturalism, Muslims and Citizenship: A European Approach* (Routledge, Abingdon, 2006); J Bowen, *Why the French Don’t Like Headscarves: Islam, the State, and Public Space* (Princeton University Press, Princeton, 2008).

<sup>129</sup>Conseil d’État, Section de l’intérieur, 27 novembre 1989, n° 346893, Avis ‘Port du foulard islamique’.

<sup>130</sup>Commission de réflexion sur l’application du principe de laïcité dans la République, *Rapport au Président de la République* (11 December 2003).



secondary schools.<sup>131</sup> In a memorandum, the Ministry of Education explained that the ban was meant to foster secularism, individual freedom and gender equality, as well as to protect schools from communitarian demands and religious pressures.<sup>132</sup> Revising its earlier position, the State Council subsequently upheld the expulsion of two high school pupils, one Muslim and one Sikh, despite the fact that they had substituted their respective veil and turban with more modest proxies.<sup>133</sup>

As this turnaround illustrates, judicial approaches to the prohibition of ethnic symbols have swung between the strict scrutiny of administrative regulations and the wholesale endorsement of statutory laws,<sup>134</sup> often justified by the aim of upholding a certain understanding of state neutrality or secularism. Relatedly, courts have been more inclined to protect manifestations of faith in private organisations, which can hardly be cast as representing the state. The distinction was sharply drawn in two simultaneous decisions of the French Court of Cassation concerning the dismissal of senior employees for breach of anti-veil regulations. In the CPAM case, the employer was a medical insurance fund. Classifying this as a public service, the court ruled that the claimant's right to wear the headscarf at work could legitimately be curtailed by the principle of state neutrality. In the Baby Loup case, the plaintiff worked at a private day care centre for children. The court found that its regulation could not be justified as a 'genuine and determining occupational requirement' for the specific activities performed.<sup>135</sup>

Much of the multiculturalist discourse has consisted in challenging the cultural neutrality of the state, both as a reality and as an ideal.<sup>136</sup> Applying this line of thinking to the headscarf debate, multicultural theorists would denounce the arbitrary distinction between conspicuous and non-conspicuous symbols, which shields taken-for-granted dominant cultures from neutrality requirements, and the privilege enjoyed by secular over religious identities. Moreover, they would stress that prevailing dress codes reflect idiosyncratic conventions, be they European, national, modern, urban or middle-class, that do not have any claim of universal validity. Since ethnic minorities sometimes adhere to different conventions, they should be free to do so unless some consideration other than neutrality makes it inadvisable.

The crucial shortcoming of this negative, anti-neutrality argument is that it leaves the door open to an infinite number of alternative reasons to forbid the manifestation of ethnic identities. As recent jurisprudence and political debates show, headscarf opponents

<sup>131</sup>Loi n° 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics.

<sup>132</sup>Circulaire du 18 mai 2004 relative à la mise en oeuvre de la loi n° 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics.

<sup>133</sup>Conseil d'État, 4ème et 5ème sous-sections réunies, 5 Dec 2007, 285394, Publié au recueil Lebon; Conseil d'État, 4ème et 5ème sous-sections réunies, 5 Dec 2007, 295671, Publié au recueil Lebon.

<sup>134</sup>But see the German Constitutional Court decision of 27 January 2015, invalidating a provision in the North Rhine-Westphalia Education Act prohibiting teachers in state schools to express their religious beliefs by outer appearance (Press Release No 14/2015 of 13 March 2015).

<sup>135</sup>European Network of Legal Experts in the Non-Discrimination Field, (2013) (n 2) 49, 59–60. The Court of Cassation sitting in plenary session later reversed this decision, accepting the centre's contention that children had to be protected from exposure to staff convictions. See M Peyronnet and C Radé, 'The Ban on the Wearing of the Islamic Veil in Creches: the Baby Loup Case' (2015) 1 *Montesquieu L Rev* 1.

<sup>136</sup>P Bosset, A Gamper and T Öhlinger, 'Multicultural Societies and Migration' in M Tushnet, T Fleiner and C Saunders (eds), *Routledge Handbook of Constitutional Law* (Routledge Abingdon, 2013); V Bader, K Alidadi and F Vermeulen, 'Religious Diversity and Reasonable Accommodation in the Workplace in Six European Countries: An Introduction' (2013) 13(2-3) *Intl J of Discrimination and the Law* 54.

have been quick to capitalise on this weakness, creatively enriching their case with references to the emancipation of women, conviviality, national cohesion, the fight against terrorism and radicalism, health and safety issues, the legitimacy of public institutions, expeditious security checks, the protection of children and so on.<sup>137</sup> However flimsy their empirical basis, such contentions have held sway for lack of a convincing countervailing perspective.

In this somewhat gloomy context for ethnic identification, the glimmer of hope might come from the forward-looking, consequentialist defences articulated by critical theorists such as Galeotti and Laborde. Significantly, both have used the headscarf debate as a primary source of normative reflection. According to Galeotti, the allowance of visible ethnic practices should not only be based on their compatibility with liberal principles or lack of interference with competing interests, but over and above all on their contribution to the legitimisation of despised identities. The very fact that they are often vehemently rejected despite their lack of plausible negative consequences demonstrates that they raise their own unique issues, qualitatively different from the practical inconveniences that might stand in the way of other accommodations. By expressing their identities, ethnic minorities challenge established conceptions of public normality, bringing out into view a trait that had previously been forcibly confined to the private sphere. This is generally perceived as a trespass on public neutrality, perhaps even as a threat to the customs and status of the majority, and thus as a legitimate object of repression. The official acceptance of ethnic differences would reverse this process by shifting the boundaries of the normalised citizenry. Just like their concealment reinforces the stigma, their presence in public spaces would enhance their status.<sup>138</sup>

In the same vein, Laborde has criticised the French authorities for disregarding the ways in which colour-blindness indirectly aggravates the ethnicisation of social relations by consolidating an exclusive national ideal. In order to mainstream Muslim identities, she argues, Frenchness should be detached from traditional lifestyles, culinary customs or aesthetic preferences. Young Muslims who disrupt the Republican model of a homogeneous public sphere help achieve this by showing that one can be French and pray five times a day, not enjoy wine and ham, and wear Islamic clothes. In other words, they teach their friends and peers that national belonging and solidarity need not be synonymous with cultural sameness, thus destabilising and possibly reconciling oppositional identities.<sup>139</sup>

There is considerable empirical support for the proposition that ethnic prejudice and discrimination is often tied to the exclusiveness of national identities. According to the social psychological theory of in-group projection, for instance, national prototypes provide a number of values based on which individuals judge themselves and others. Personal traits that are perceived as 'typically national' thus tend to receive favourable

<sup>137</sup>P Bosset, 'Mainstreaming Religious Diversity in a Secular and Egalitarian State: The Road(s) Not Taken in Leyla Sahin v Turkey' in E Brems (ed), *Diversity and European Human Rights: Rewriting Judgments of the ECHR* (CUP, Cambridge, 2013); A Solanes Corella 'Limiting Rights in Public Space: Women, Veils and Conviviality' (2015) 31 *Cuadernos Electrónicos de Filosofía del Derecho* 62; I Rorive, 'Religious Symbols in the Public Space: In Search of a European Answer' (2009) 30(6) *Cardozo L Rev* 2669; C Joppke, *Veil: Mirror of Identity* (Polity Press, Cambridge, 2009) 53–80; C Evans, 'The "Islam Scarf" in the European Court of Human Rights' (2006) 7 *The Melbourne J of Intl Law* 52; N Nathwani, 'Islamic Headscarves and Human Rights: A Critical Analysis of the Relevant Case Law of the European Court of Human Rights' (2007) 25 *Netherlands Q of Human Rights* 221.

<sup>138</sup>A Elisabetta Galeotti, *Tolerance as Recognition* (CUP, Cambridge, 2002) 85–114.

<sup>139</sup>C Laborde, *Critical Republicanism: The Hijab Controversy and Political Philosophy* (OUP, Oxford, 2008) 202–29.

evaluations, whereas ‘foreign’ ones are viewed negatively.<sup>140</sup> This forebodes many difficulties for ethnic minorities, who will inevitably be assessed against local standards by those who identify with the majority. Fortunately, the model signals two possible remedies. The first would consist in forswearing thick, clearly defined national identities, for instance by recognising their internal tensions and contradictions. The second would require the substitution of monolithic national representations by more complex ones including multiple prototypes or subgroups.<sup>141</sup> In principle, both strategies seem to dovetail with Galeotti and Laborde’s call for a greater visibility of ethnic differences in the public sphere.

Beyond national identities, ethnic symbols could also promote equality by multiplying the attitudinal benefits of personalised intergroup contacts. Over the last decades, prejudice research has not only established the trust-building properties of cooperative interactions,<sup>142</sup> but also the conditions under which they must take place for their impact to be maximised.<sup>143</sup> One of these conditions consists in making the stigmatised trait as salient as possible, fostering the perception that the individual being dealt with is representative of her social category. Failure to meet this condition might allow and even facilitate the formation of interpersonal bonds, but ensuing attitudes will likely remain circumscribed at the individual level, leaving collective stereotypes intact.<sup>144</sup>

If the causal link between ethnic invisibility and prejudice is to be taken seriously, courts should recognise a categorical distinction between symbolic and non-symbolic ethnic practices, reserving for the latter the open-ended proportionality tests of indirect discrimination. As for the former, they should be protected by the much stricter necessity test usually applied in cases of direct discrimination.<sup>145</sup> On its own, this humble judicial innovation could do more to promote substantive equality than many ambitious anti-racist programmes.

#### IV. Conclusion

Since the mid-1990s, much thought has been given to the meaning of justice and legal equality in culturally diverse western societies. Philosophers have sought to fill in the blind spots of classical liberalism by discarding its assumption of a descent-based citizenry and looking for ways to make institutions more hospitable to immigrants and their descendants. Courts have attempted to strike a balance between adherence to general legal rules and protection of religious freedom and non-discrimination. In the meantime, empirical research has enriched our understanding of integration processes, both at the individual level and as a part of broader structural dynamics. Despite all these insights,

<sup>140</sup>M Wenzel, A Mummendey and S Waldzus, ‘Superordinate Identities and Intergroup Conflict: The Ingroup Projection Model’ (2007) 18 *Eur Rev of Social Psychology* 331.

<sup>141</sup>*ibid* 340. For an empirical test, see S Pehrson, V Vignoles and R Brown, ‘National Identification and Anti-Immigrant Prejudice: Individual and Contextual Effects of National Definitions’ (2009) 72(1) *Social Psychology Q* 24.

<sup>142</sup>T Pettigrew and L Tropp, ‘A Meta-Analytic Test of Intergroup Contact Theory’ (2006) 90(5) *J of Personality and Social Psychology* 751.

<sup>143</sup>T Pettigrew, ‘Intergroup Contact Theory’ (1998) 49 *Annual Rev of Psychology* 65; T Pettigrew and L Tropp, ‘How Does Intergroup Contact Reduce Prejudice? Meta-Analytic Tests of Three Mediators’ (2008) 38 *Eur J of Social Psychology* 922.

<sup>144</sup>R Brown and M Hewstone, ‘An Integrative Theory of Intergroup Contact’ (2005) 37 *Advances in Experimental Social Psychology* 255.

<sup>145</sup>European Network of Legal Experts in the Non-Discrimination Field, *Developing Anti-discrimination Law in Europe: The 28 EU Member States, the Former Yugoslav Republic of Macedonia, Iceland, Liechtenstein, Norway and Turkey Compared* (Publications Office of the European Union, Strasbourg, 2013) 72.

the legal accommodation of ethnic practices remains a disputed issue, leading to inconsistent judicial responses, social anxiety and capricious legislation. This article has attempted to clear the path for a more systematic approach, based on the normative standard of substantive equality and the demarcation of four legal categories: criminal offences, human rights violations, civil infractions and symbolic identification.

Like sex, race, sexual orientation, sexual identity, disability and age, ethnicity tends to be associated with many stereotypes, exposing its bearers to various forms of discrimination. This provides a moral basis for its legal protection through emancipating forms of differential treatment. Compared to other protected characteristics, however, ethnicity is relatively amenable to change. Therefore, some of its manifestations can legitimately be discouraged in a way that would be unthinkable for less mutable traits. On the other hand, ethnicity can be distinguished from other surmountable stigma by the fact that it is acquired in childhood, serves important purposes, inevitably follows from global interconnections and frequently overlaps with race. These features suggest that a minimum level of social justice can hardly be achieved without states' active involvement in the normalisation of cultural difference.

In some cases, the gap between ethnic and dominant norms is such that a minority practice is legally defined as a crime. Although the amount of harm it causes may be difficult to assess, legislative bodies usually carry out harm analyses by balancing multiple competing interests among the population they represent. For the courts, the core normative issue is the determination of blameworthiness, which depends on the link between a defendant's mental state and behaviour. Ethnic differences in attitudes and beliefs may bear on general defences that can lead to an acquittal or mitigated punishment, but minorities are often prevented from introducing the relevant evidence due to culturally biased requirements that the alleged state of mind be reasonable. Such requirements should be relaxed or deprived of their ethnocentric character. However, an exception would need to be made for discriminatory ethnic norms, whose admission in court could give free rein to judicial stereotyping and erroneous psychological assessments. Depending on the context, this would either lead to the lesser protection of subordinated social categories or to misguided findings of hate crime.

Direct judicial evaluations of the compatibility between ethnic practices and fundamental rights are generally precluded by the fact that international and constitutional human rights obligations primarily fall on public authorities, where minority norms have little influence. With the expansion of states' positive duties to protect rights against private interference, however, courts may have to balance them with the obligation to respect religious or cultural freedom. In particular, the development of 'horizontal' anti-discrimination laws is currently putting pressure on the historical tolerance of rights-impinging religious practices. To the extent that these interventions oblige powerful organisations to increase the participation and status of women, homosexuals or (other) religious minorities, their judicial endorsement generally advances substantive equality. Conversely, the direct application of human rights provisions in private disputes runs the risk of putting judicial discretion at the service of majority sensitivities and colliding with the interests of the subordinated individuals it purports to protect.

A vast majority of forbidden ethnic customs collide with civil regulations, whose moral status depends on the process that leads to their adoption. In a society where ethnic minorities could exert proportional influence on the design of public and private institutions,

no specific moral problem would arise from the prohibition of some of their practices. Unfortunately, contemporary multicultural societies do not live up to this ideal. Reasonable ethnic concerns are often neglected or strongly criticised, in part because positions of power are controlled by the cultural majority and in part because prejudices impede a fair assessment of the interests involved. The legal prohibition of indirect discrimination helps counter these deliberative deficits by imposing a duty upon decision-makers to give minority demands a fair hearing. While a wide range of legitimate aims may justify the rejection of an accommodation, courts are thus invested with a crucial mandate to remove arbitrary and exclusionary conventions.

Restrictions on the display of ethnic symbols, including those with a religious element, stand out as an especially widespread form of weakly justified constraint on cultural difference. Immigrants and their offspring may resort to these symbols to underscore their specific identity in a number of contexts, regardless of their participation in the wider society. Because of its stigmatised status, visible ethnicity is frequently perceived as a threat to common values or state neutrality. Upon closer inspection, however, claims of neutrality mask the fact that established institutions embody a number of idiosyncratic preferences that cannot be framed in terms of universal principles. Moreover, the presence of ethnic symbols in public spaces makes an important contribution to the long-term elimination of racism. By expressing their distinctiveness, minorities transform national and other collective identities, making them more inclusive of the whole citizenry. In the course of their everyday interactions, they also disprove stereotypes and build intergroup trust. These crucial social functions make it imperative for symbolic ethnicity to be legally protected through the highest possible anti-discrimination standards. This would require restrictions to be strictly necessary for the achievement of important objectives rather than speculatively related to abstract principles.

## Acknowledgement

This work was supported by the Spanish Ministry of Education under Grant FPU-12/00482 and by the Spanish Ministry of Economy and Competitiveness under Grants DER2012-31771 and DER2015-65840-R (MULTIHURI project, [www.multihuri.com](http://www.multihuri.com)). I would like to express my sincere gratitude to Ángeles Solanes and Pierre Bosset for investing their time and expertise in the clarification of its arguments. The article's focus, method and underlying motivation also owe much to the research programme developed by María José Añón, Javier de Lucas and other colleagues at Valencia University's Human Rights Institute.